OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 16 January 1997 *

1. Essentially, the question referred to the Court of Justice by the Queen's Bench Division of the High Court of Justice, which is hearing an appeal from a decision of the London VAT Tribunal, is this: must a company carrying on business as a commercial agent for a tour operator which is established in another Member State and holds all the shares in that company be regarded, for the purpose of applying the Sixth VAT Directive, [1] as a fixed establishment of the parent company or as an intermediary acting for it?

2. The facts may be summarized as follows.

DFDS A/S (hereinafter also referred to as 'the Danish company') operates, *inter alia*, as a tour operator. It is incorporated under Danish law and has its registered office in Copenhagen.

The Danish company owns all the capital of DFDS Ltd, a company incorporated under English law (hereinafter 'the English company'), which operates in Harwich as a commercial agent for its parent company, selling package tours organized by the latter. [2]

3. The parent company and its subsidiary concluded an agency agreement to govern relations between them. [3] In that document the English company was appointed general sales and port agent for the Danish company (or, more precisely, for the passenger division of that company, Scandinavian Seaways) and it was entrusted with making reservations — throughout the United Kingdom and Ireland — for the passenger services operated by the Danish company (Clause 1).

* Original language: Italian.

1 — Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

2 — Until 1989, DFDS Ltd sold tours directly in the United Kingdom and it was taxable, for VAT purposes, on the margin it made on the tours. It was only in 1989 that the tours were offered by DFDS A/S in its own name and DFDS Ltd ceased to be subject to value added tax in respect of the organization of package tours in the United Kingdom.

3 — A first agreement was concluded on 1 January 1989. It was replaced by a new one in essentially identical terms on 1 December 1991.

The agreement places other obligations on the subsidiary. The tasks required of it include the following: providing assistance to the parent company in supervising and controlling tours (Clause 2); making available qualified sales and operational personnel (Clause 3.1); consulting the parent company regarding the employment of management staff (Clause 3.2); obtaining the approval of the parent company before concluding any major contracts and for the appointment of advertising and public relations agents (Clause 3.3). The English company is also required to promote its commercial image in accordance with the parent company's strategies and within the financial constraints specified by it (Clause 3.5). The English company must (Clause 3.8) deal with passengers' complaints and is subject to other obligations in accordance with the company's policy, including refraining from taking any legal proceedings without the parent company's prior approval. Clause 3.9 of the agency agreement provides, finally, that the English company is not authorized to work for other passenger transport companies without the parent company's prior consent.

In return for such activities (Clause 4.1.1.) the parent company pays a gross commission of 19% on all fares sold by the English company.

4. A number of other background details will clarify the relationship between the two companies.

According to the case-file, when called on to do so — either directly by a customer or through a travel agency — the English company has access, through a terminal in Harwich, to the Danish company's central computer in Copenhagen, which contains information on the availability of passenger space and hotel accommodation. Where the trip or accommodation requested is available, the reservation is accepted and the English company provides the passenger with the requisite documentation. That documentation is issued in the name and on behalf of the Danish company.

As far as the strictly financial aspect is concerned, however, the discretion enjoyed by the English company in matters of pricing is extremely limited. It must observe the framework laid down by the Danish company in consultation with the English company. And at the end of each month, the receipts of the English company are transferred, after deduction of the agreed margin of 19%, to the Danish company's account.

The English company thus carries on directly the business of marketing and advertising, but coordinates its activities with the

commercial division of the Danish company. The latter, it will be remembered, reimburses the advertising expenses incurred.

5. In 1993, the United Kingdom tax authorities adopted a decision requiring DFDS A/S to register in the United Kingdom for the purposes of paying value added tax. More specifically, they stated in a letter of 20 August 1993 that the Danish company was to be liable to VAT in relation to tours sold by the English company in the United Kingdom. The United Kingdom authorities regarded DFDS Ltd as a 'fixed establishment' of the parent company and therefore concluded that the latter should pay VAT in the United Kingdom in respect of the services provided there by the English company.

6. The Danish company takes a different view. It considered (and still does) that the services provided by the English company should (and must) be regarded, for tax purposes, merely as an intermediary activity for the parent company. The services being of that kind, it follows that, under United Kingdom law, the taxable amount must be solely the amount (the so-called 'margin') paid to the English company for acting as an intermediary for the parent company. [4]

7. Relying on those arguments, DFDS A/S contested that decision before the VAT Tribunal, London.

The tribunal allowed the appeal: the Danish company had its principal place of business in Denmark and could not be subject in the United Kingdom to VAT on services sold in Harwich. There were two reasons for this: the criterion of the place where the supplier has established his business must take precedence over the criterion of the fixed establishment; and the human and technical resources of the English company must be regarded as constituting the fixed establishment of that company and not of the parent company. [5]

4 — The Danish company's interest in not being liable to VAT in the United Kingdom derives from the fact, acknowledged by counsel for that company at the hearing, that Denmark, exercising the right conferred on it by the Sixth Directive, has granted a VAT exemption to companies operating as travel agencies.

5 — In paragraph 6 of its decision of 23 August 1994 (LON/93/2396A) the VAT Tribunal stated 'although the English Company's premises are no doubt a "fixed establishment" they are the fixed establishment of the English company not of the Danish company'.

8. The High Court, before which an appeal was bought by the United Kingdom tax authorities, has referred the following question to the Court of Justice for a preliminary ruling:

'On the proper interpretation of Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes (the Sixth VAT Directive), and in particular Article 26 thereof, where a tour operator has its headquarters in Member State A but supplies services in the form of package tours to travellers through the agency of a company in Member State B:

(a) in what (if any) circumstances is the supply of those services by the tour operator taxable in Member State B?

(b) in what (if any) circumstances can it be said that the tour operator "has established [its] business" in Member State B or "has a fixed establishment from which [it] has provided the services" in Member State B?'

In the course of the procedure, written observations were lodged by DFDS A/S, the Italian Government, the United Kingdom Government and the Commission. Representatives of DFDS A/S, the Governments of the United Kingdom and the Federal Republic of Germany and the Commission took part in the hearing.

Legislative background

9. Having thus set out the facts, let us now consider what legislation is applicable to this case. The relevant provisions are the following articles of the Sixth Council Directive of 17 May 1977:

Article 9(1) lays down general rules to determine the place at which a service subject to VAT is supplied:

'The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.'

Article 26 (paragraphs (1) and (2)) lays down conditions specifically applicable to travel agencies. It provides:

'1. Member States shall apply value added tax to the operations of travel agents in accordance with the provisions of this article, where the travel agents deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. This article shall not apply to travel agents who are acting only as intermediaries and accounting for tax in accordance with Article 11(A)(3)(c). In this article travel agents shall include tour operators.

2. All transactions performed by the travel agent in respect of a journey shall be treated as a single service supplied by the travel agent to the traveller. *It shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has provided the services.* The taxable amount and the price exclusive of tax, within the meaning of Article 22(3)(b), in respect of this service shall be the travel agent's margin, that is to say, the difference between the total amount to be paid by the traveller, exclusive of value added tax, and the actual cost to the travel agent of supplies and services provided by other taxable persons where these transactions are for the direct benefit of the traveller' (emphasis added).

Article 28(3)(g) provides that, during the transitional period provided for in paragraph (4), the Member States may

'(g) By way of derogation from Articles 17(3) and 26(3), continue to exempt without repayment of input tax the services of travel agents referred to in Article 26(3).'

Legal assessment

10. As stated in the seventh recital in the preamble to the Sixth Directive, 'the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between Member States in particular as regards ... the supply of services'. The legislation at issue also provides not only for harmonization of the rules laid down by the Member States in this area but also for determination of the criteria for resolving any conflicts between the various jurisdictions involved.

11. Article 9(1) provides in general terms how the place of the supply of services is to be identified. Primarily, the criterion adopted relates to the place where the supplier has established *his business* or has a *fixed establishment from which the service is supplied.* In the absence of such a place of business or establishment, regard is had, on a subsidiary basis, to the further criterion of the place where the supplier has his permanent address or usually resides.

12. Article 26, on the other hand, lays down special VAT rules for travel agencies and tour operators. The legislature's decision to tax the 'travel agent's margin' derives from the particular features of travel agency business and more specifically from the requirement of subjecting to tax, at the place where they are actually supplied, the individual services comprised in the more general business of organized tours. In that connection, the Court has had occasion to state that '[t]he services provided by these undertakings most frequently consist of multiple services, particularly as regards transport and accommodation, either within or outside the territory of the Member State in which the undertaking has established its business or has a fixed establishment.' [6] It was therefore considered that failure to adopt a special regime would, 'by reason of the multiplicity of services and the places in which they are provided, entail practical difficulties for those undertakings of such a nature as to obstruct their operations'. [7]

13. However, there is a connection between the two provisions mentioned above which must be taken into account in their interpretation. In order to determine whether DFDS A/S's income from package tours marketed by its subsidiary DFDS Ltd should be included in the taxable amount of the travel agency in the United Kingdom or in Denmark it is necessary to refer to Article 9. The national court itself has recognized, with respect to travel agencies, that the points of reference mentioned in the second sentence of Article 26(2) — the place where the supplier has established his business or the fixed establishment from which he provides the services — are similar in several respects to those contained in the provision laying down the general rules. [8] It is therefore important first of all to bear in mind how the latter provision has been construed in earlier decisions of the Court of Justice.

14. In *Berkholz*, the Court gave guidance regarding various aspects of Article 9, clarifying the meaning of the terms place where the supplier has established his business and

6 — Case C-163/91 *Van Ginkel* [1992] ECR I-5723, paragraph 13.

7 — *Van Ginkel*, cited in the preceding footnote, paragraph 14.

8 — Order for reference (5.5.2).

fixed establishment, and the relationship between those two terms. [9]

15. Defining the concept of the place where the undertaking has established its business does not, in Advocate General Mancini's view, raise 'problems'. It is clear that the term 'should be understood in its technical sense [that is to say, as referring to] ... the registered office, as indicated by the statutes of the company owning the supplier undertaking'. [10] And in the present case there is no doubt — a fact accepted by all the parties in the proceedings — that DFDS A/S is a company incorporated in accordance with Danish law and has its registered office in Denmark.

16. More problematical, however, in so far as an economic term is involved, is the task of determining the meaning of 'fixed establishment from which the service is supplied'. In its judgment in *Berkholz*, the Court held that a precondition for the existence of a fixed establishment is the 'permanent presence of both the human and technical resources necessary for the provision of those services'. [11]

17. With regard to the connection between the two points of reference, the Court went on to make it clear that an order of precedence must be observed. Specifically, it is only if 'the reference to the place where the supplier has his business does not lead to a *rational* result for tax purposes or creates a conflict with another Member State' that account must be taken of another establishment from which the services are supplied. [12] In short, the place where the supplier has established his business must be seen as the 'primary point of reference'. [13]

18. Having thus clarified the concepts applicable, let us examine the substance of this case. In answering the questions submitted by the national court, we must ask ourselves at the outset whether the English company can be regarded, by virtue of the nature of its relationship with its parent company, as a 'fixed establishment' of the Danish company, from which the services are supplied. Secondly, it is necessary to identify, in the light of the facts, which of the two criteria described above should be applied to the present case.

19. In order to determine whether the English company comes within the definition of a 'fixed establishment' of the parent company, from which the services are supplied, help is provided in my opinion by several pronouncements of the Court in competition matters with particular reference to the

9 — Case 168/84 *Berkholz* v *Finanzamt Hamburg-Mitte-Altstadt* [1985] ECR 2251.

10 — Opinion of Advocate General Mancini in Case 168/84, cited above, (p. 2252, point 2).

11 — Paragraph 1 of the operative part of *Berkholz*, cited above.

12 — *Berkholz*, paragraph 17.

13 — *Berkholz*, paragraph 17.

concept of agency. I refer more precisely to the decisions in which the scope of Article 85(1) of the Treaty has been defined in relation to commercial agents. [14]

20. The problem, of course, was — and is — that of deciding in what circumstances a commercial agent must be regarded as an entity distinct from its principal. The conclusion reached on that point then serves as basis for deciding whether or not the relations between the principal and the agent can be appraised by reference to Article 85(1). That provision can in fact only be applied where the agent is independent. As Advocate General Tesauro has said, '[w]here the representative forms part of the principal's undertaking, this would seem to entail the agent's "disappearance" as an independent economic operator'. [15]

21. In its judgment in *VVR*, the Court clarified the point specifically with regard to a travel agency. [16] Responding to an objection raised by the Belgian Government, the purpose of which was to remove certain commercial relations entered into by a tour operator with a travel agency from the scope of Article 85(1), the Court held that 'a travel agent of the kind referred to by the national court must be regarded as an independent agent who provides services on an entirely independent basis. *He sells travel organized by a large number of different tour operators and a tour operator sells travel through a very large number of agents.* ... a travel agent cannot be treated as an auxiliary organ forming an integral part of a tour operator's undertaking' [17] (emphasis added).

22. On close examination, it is clear that what the Court decided on that occasion is relevant to resolution of the present case. Without doubt, according to the criteria on which the Court relied in that case, DFDS Ltd cannot be regarded as an independent agency. The reasons for this relate both to the structure of its ownership and to functional aspects: in the first place, the ownership of all the capital of the subsidiary company is indicative of its 'dependency' on its parent; and secondly — and this is the functional aspect to be considered in the light of the last-mentioned judgment of the Court — the English company, in contrast to the position in the *VVR* case, does not market tours organized by a very large number of tour

14 — See Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299; Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663; Case 311/85 *Vereniging Vlaamse Reisbureaus* [1987] ECR 3801 ('*VVR*'); Case C-266/93 *Bundeskartellamt* v *Volkswagen and VAG Leasing* [1995] ECR I-3477.

15 — Opinion of Advocate General Tesauro in Case C-266/93, cited in the previous footnote, at p. I-3479.

16 — Case 311/85, cited above.

17 — Judgment cited in the preceding footnote, paragraph 20.

operators. Rather, its contractual link with its parent means that its agency business can be carried on only in relation to the parent, unless the latter has expressly consented otherwise. Besides, as the agency agreement defines the relations between the parent company and the subsidiary, the latter has no effective independence from the former in the conduct of its business. The same conclusion follows from a number of points made earlier: in particular, the need for prior approval from the parent company regarding management of the subsidiary company, such as the appointment of senior staff (Clause 3.2), the conclusion of major contracts, the appointment of advertising and public relations agents (Clause 3.3), and the lack of any discretion in setting the prices of services. All in all, it seems to me that, having regard to its legal form, the English company acts as an *auxiliary* to the parent company.

23. In the *Volkswagen* judgment cited earlier, the Court laid stress on the criterion of risk: '[r]epresentatives can lose their character as independent traders' — it affirmed — 'only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal'. [18] Now, even if that criterion is adopted, the conclusion which I advocate concerning the auxiliary status of DFDS Ltd in relation to its parent must stand. The position of the English company is different from that of the German concessionaires in the *Volkswagen* case. It does not seem in fact to bear any financial risk under the contracts it concludes with consumers in the course of its agency work on behalf of the Danish company.

24. The English company is therefore an auxiliary organ forming part of the Danish company from the economic point of view. It remains to be seen whether DFDS Ltd can be regarded as a 'fixed establishment' of the parent company.

25. Of importance in that regard is the reference made in the United Kingdom's observations to the case-law of the Court of Justice. The judgments mentioned are those in the *Factortame* and 'Co-insurance' cases, both of which are relevant to the present proceedings. [19]

Factortame makes it clear that the concept of establishment 'involves the actual pursuit of an economic activity through a fixed estab-

18 — Case C-266/93, cited above, paragraph 19.

19 — Case C-221/89 *Factortame* [1991] ECR I-3905; Case 205/84 *Commission* v *Federal Republic of Germany* [1986] ECR 3755.

lishment in another Member State for an indefinite period'. [20]

Even clearer, for the purposes of this case, is the second judgment cited above. There it is stated that 'an (insurance) undertaking of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, *even if that presence does not take the form of a branch or agency*, but consists merely of an office managed by the undertaking's own staff *or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency*'. [21]

26. Let us now consider whether the requirements laid down by the Court in those decisions are met in this case. In my opinion they are. There is actual pursuit of an economic activity, it is pursued for an indefinite period and there is a fixed establishment. All those points are confirmed by the detailed examination of the facts undertaken by the VAT Tribunal. The decision adopted by that tribunal highlights a number of factors, the most important of which — and here I share the view expressed by the Commission's representative at the hearing — is the fact that the English company has about 100 employees. And there is no shortage of other considerations of a factual nature to support the view that, in addition, the service offered to consumers originates in the United Kingdom. The contract is concluded in the United Kingdom; it may be presumed that payment is made in local currency; any complaints from customers will be dealt with by the English company; and the parent company reimburses any expenses incurred by DFDS Ltd in legal proceedings to protect its interests.

27. On the basis of the matters which I have described, DFDS Ltd fulfils the conditions for classification as an establishment, as defined in *Berkholz*. There is 'permanent presence of both the human and technical resources necessary for the provision of those services'. There is everything necessary for a fixed 'establishment'.

It is also important to bear in mind that the circumstances of the present case are entirely dissimilar to those of the one at present before the Court in Case C-190/95. In that case Advocate General Fennelly has proposed that the Court opt for the criterion of

20 — Case C-221/89, cited above, paragraph 20.

21 — Case 205/84, cited above, paragraph 21 (emphasis added). Reference should also be made to the Opinion of Advocate General Darmon in Case 81/87 *Daily Mail and General Trust*, in which, referring to the dicta in Case 205/84, cited above, he stated '[t]he right of establishment can manifest itself in two different ways. On the one hand, subsidiaries, branches or agencies may be set up. That is known as secondary establishment' ([1988] ECR 5500, point 4). See also the judgment of 27 September 1988 in that case: 'the right of establishment is generally exercised by the setting up of agencies, branches or subsidiaries' (paragraph 17).

the place where the undertaking has established its business, [22] it being incorporated in the Netherlands, rather than the other place — Belgium — where the undertaking carries on a car-leasing business. In making that proposal, the Advocate General relies on various factors, including the fact that the Netherlands company had no place of business in Belgium, whilst the car-leasing contracts were concluded in the Netherlands and represented the major part of the services offered by it, which were entrusted to a large body of persons and resources. [23] What consequence can be drawn from the conclusions reached by the Advocate General in that case which may be relevant to the examination to be undertaken by the Court here? It must be, I think, that we should recognize that in this case there is a fixed establishment in the United Kingdom, as defined by Community legislation.

28. The questions to be considered require, finally, clarification of the relationship between the two criteria provided for in Article 26(2). I said earlier, referring to *Berkholz* and later judgments of the Court of Justice, that the fixed establishment is to be taken into account only in the alternative. And that is so where reference to the place where the undertaking has established its business would not allow a rational result for tax purposes, having regard both to justification for the burden placed on the taxpayer and to identification of the Member State empowered to impose it, since the intention is to avoid any conflict with the tax-levying authorities of other Community States. [24]

29. It will be for the competent authority in each State to determine to what extent one of the two criteria should be applied rather than the other. The Court, for its part, is called on to explain and oversee fulfilment of the requirements on which the choice of one criterion rather than the other should be based. Thus, in the present case, attention must be focused on the consequences that would flow from the general criterion of the place where the supplier has established his business. If the result is rational, as intended by the directive, that is the rule to be preferred. There is no need for the other, which concerns the place of the fixed establishment.

30. The United Kingdom Government is in favour of following the approach taken by Advocate General Mancini in his Opinion in *Berkholz* and resolving the problem by reference to the general principles laid down in

22 — Opinion delivered on 12 December 1996 in Case C-190/95 *ARO Lease* v *Inspecteur der Belastungdienst Grote Ondernemingen te Amsterdam.*

23 — Point 21 of the above Opinion.

24 — See most recently, to the same effect, Case C-231/94 *Faaborg-Gelting Linien* v *Finanzamt Flensburg* [1996] ECR I-2395, paragraphs 16 and 17). See also the Opinion of Advocate General Fennelly of 28 November 1996 in Case C-167/95 *Maatschap M. J. M. Linthorst*, [1997] ECR I-1195, point 26.

Community tax legislation. [25] They include the requirement that VAT be levied at the place where the service is provided. That said, and having regard also to the relationship between the English company and its parent, the United Kingdom Government infers that DFDS Ltd is a secondary establishment of DFDS A/S. The latter is therefore, in its view, taxable in the United Kingdom in respect of the services provided from Harwich.

31. The solution contended for by DFDS is the opposite one: recourse to the criterion of the registered office is far from irrational or unjustified. In contrast, the criterion of the fixed establishment would lead to confusion, conflicts of jurisdiction and unnecessary complications in the operation of the VAT system. [26]

32. I feel, for the reasons given below, able to align myself with the view advanced by the United Kingdom Government. I am also of the opinion that reference to the place where the supplier has established his business does not in this case lead to a rational result. The first consequence of such an approach would in fact be failure to apply the legislative criterion that the place of taxation must fundamentally coincide with that at which the service is supplied to the consumer. That is the basic criterion: the VAT system must be applied in a manner as far as possible in harmony with the actual economic situation. I do not consider it logical for the subsidiary criterion, when the possibility of applying it is assessed, to be automatically treated as being subordinate to that of the place where the supplier has established his business.

33. Furthermore, application of the latter criterion, as advocated by the Danish company, would exacerbate the problems in this case, rather than simplifying them. What would happen if undertakings in the sector were allowed freely to determine, by choosing the location of their registered office, the place at which the services provided by them were to be taxed? There would be distortion of freedom of competition and other, more wide-ranging repercussions for the business world.

Article 28(3)(g) gives Member States the power to grant exemptions and it is not difficult to imagine that undertakings might choose to establish their registered office in the territory of a Member State which has

25 — United Kingdom observations, paragraph 24. The reference is to point 2 of the Opinion of Advocate General Mancini who, having raised the question of which of the two *main* criteria in Article 9 was to prevail where the place where the supplier has established his business and the fixed establishment did not coincide, gave the following answer: 'The provision is silent in that regard; nor does the preamble to the directive provide any assistance.... I therefore propose to *rely on the general principle that value added tax should be charged at the place of consumption* and hence give preference to the criterion which enables the supply of services to be located more accurately. There is no doubt that the more appropriate of the two for that purpose is the criterion of the "fixed establishment", which is clearly more precise' (emphasis added).

26 — Paragraph 21 of DFDS's observations.

made use of that power. Denmark has done so. To accept the criterion of the registered office in such a case results in distortion of competition between undertakings operating in the same market. In this case, tour operators in the United Kingdom would be discriminated against for establishing their headquarters in one place rather than another. Some of them would be subject to VAT on the services provided by them and others would not.

34. It is therefore necessary to consider the wording and purposes of Article 26(2). The reader cannot fail to notice the significance of the fact that the second sentence of Article 26(2) expressly lays down two criteria rather than just one. That is because the legislature envisaged not only the case of the registered office but also the case where the activity carried on by tourist agencies extends over a wide area and services are provided from various places within the territory of the Community. And it is to cover the second case that the scheme of the directive treats as the place of taxation the place where the service is actually provided and not the other place, where the undertaking has its fixed establishment. The criterion of the establishment from which the service 'emanates' is subordinate to that of the place where the supplier has established his business in the sense that it applies in the alternative. However, it too is a primary criterion. The legislature took the view that for tax purposes it was no less important than the criterion of the place where the supplier has established his business. If that were not the case, the provision in question would have been framed differently: the place where the supplier has established his business would have been adopted as the sole criterion, at least as regards undertakings set up within the territory of the Community; and the criterion of the fixed establishment would have had to have been limited to circumstances in which the services are supplied within the Community whilst the undertaking's principal place of business is established outside Community territory. [27] It should also be borne in mind that, in reading the judgment in *Berkholz*, due account must be taken of the facts of that case. The scope of that judgment must not be unjustifiably extended by construing it as meaning that the criterion of the establishment from which the services are provided is necessarily merely residual. [28] That solution would conflict with the principles underlying the Community rules.

27 — Also, I agree with the Commission's view that the interpretation of Article 26(2) given by DFDS A/S is illogical. I consider that the proper objective of the provision, that of reducing to a single service for tax purposes the various services involved in the business of the tour operator, does not thus extend, as contended by the Danish company at the hearing, to the place of the supply of the service, in the sense that there should also be only one place of supply. The two aspects of the rules — *determination of the services* liable to VAT and of the *place* where they are so liable — are in fact logically separate and must in my opinion remain so. To recognize, thus, that the place of the service is the location of the fixed establishment from which it is supplied would not in my view lead to any fragmentation or dispersion of fiscal competence, as feared by DFDS A/S at the hearing. Rather, such a solution would simply result in subjecting tour operators' services (seen as a whole) to VAT at the place where they are actually provided to the consumer.

28 — See P. Farmer and R. Lyal, *EC Tax Law*, Oxford, 1994, p. 160. The authors, having stated that 'the Berkholz judgment might be understood as expressing a reluctance on the part of the Court to refer to secondary establishments. The Court's words must, however, be read in the light of the circumstances of the case, in which a taxable person sought to escape the Community's tax jurisdiction by creating national establishments outside Community territory', conclude 'it is submitted that, in a genuine case in which a supplier ... has several business establishments all capable of performing services, the most appropriate method of determining the place of supply for the purposes of Article 9(1) ... would be to identify the establishment of the supplier whose resources were primarily used for supplying the service'.

35. The view put forward by the Danish company is not in conformity with those principles — in fact it errs towards formalism. It fails to take account of the fact that the economic realities of this case justify making travel agency business subject to VAT at the place where the services are provided.

That is not all. This case cannot be decided in the way advocated by the Danish company without disregarding the method of interpretation which, in my view, should be used in analysing this case. I draw support in making that choice from the view expressed in Advocate General Darmon's Opinion in the *Daily Mail* case. In that case it was necessary to assess the conditions under which the location of the central management of an undertaking could be identified. He concluded: 'That designation [of the place where the central management is located] *cannot be arrived at by means of a formal legal assessment* which does not take account of a number of factual elements the respective scope of which may vary according to the type of company involved' (emphasis added). [29]

36. Moreover, an indirect but significant confirmation of the correctness of that conclusion lies in the fact that the Community legislature decided not to adopt an opinion put forward by the Value Added Tax Committee — and included in the Proposal for a Nineteenth Directive — which contemplated the addition of a further paragraph to Article 9. The new paragraph, paragraph (4), would have adopted an extensive definition of fixed establishment embracing any fixed installation of a taxable person, '*even if no taxable transaction can be carried out there.*' [30]

37. The fact that the legislature chose not to amend Article 9 in those terms can be explained, in my opinion, precisely by the intention to emphasize the importance of the concept of the 'fixed establishment'. That concept is an eminently economic concept, as the Italian Government points out in its observations. It refers solely to an establishment from which services may be provided — by virtue of the sufficiency of the human and technical resources assigned to it — and are actually provided.

29 — Point 7 of the Opinion cited (and see also the reasoning in point 8).

30 — Proposal for a Nineteenth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes, amending Directive 77/388/EEC, presented by the Commission to the Council on 5 December 1984 (OJ 1984 C 347, p. 5; Article 1(b) — emphasis added). The legislative history of this proposed amendment is given in P. Farmer and R. Lyal, op. cit., p. 158.

Conclusion

For the foregoing reasons, I propose that the Court reply as follows to the questions referred to it by the High Court of Justice:

Where a tour operator has its headquarters in Member State A but supplies services in the form of package tours through its agent in Member State B, the supply of those services by the tour operator is subject to VAT in Member State B, provided that the company acting as agent is not autonomous and independent from the tour operator but is a mere auxiliary thereof and is in a form, which includes both human and technical resources, such that it is able to provide the services in question.